No. 40

In the Supreme Court of the United States

October Term, 1948.

OKLAHOMA TAX COMMISSION, *Appellant,*

vs.

THE TEXAS COMPANY, *Appellee.*

BRIEF AMICI CURIAE.

R. O. MASON,
HAYES McCOY,
Bartlesville, Okla.,
Amici Curiae.

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The facts in this suit are undisputed. This is not an ordinary suit involving rights between persons or a person and a state. The question presented is, Does the State of Oklahoma have the power to levy the taxes here involved without the consent of the Congress of the United States?

The Congress of the United States is vested by Article I, Section 8, of the Constitution with power "to regulate commerce * * * with the Indian tribes." Historically the Congress has regulated commerce with Indian tribes and members of such tribes within the United States since it was formed. The legislative, executive, and judicial branches of the United States during its history have considered, treated and dealt with such Indian tribes as dependents and wards of the United States in a state of pupilage free from regulation or control by the states except when the Congress consents thereto.

This Court said in *Cherokee Nation* v. *State of Georgia*, 5 Peters 1, through Chief Justice MARSHALL:

> "They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. *Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.*"

And in *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 34 L. ed. 295, said:

> "From the beginning of the government to the present time, they have been treated as 'wards of the nation,' 'in a state of pupilage,' 'dependent political communities,' holding such relations to the general government that they and their country, as declared by *Chief Justice* MARSHALL in *Cherokee Nation* v. *Georgia*, 30 U. S. 5 Pet. 1, 17 (8:25, 31), 'are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility'."

The power of the Government over the Indian of interest in this suit and his allotment is plenary. Article I, Section 8 of the Constitution, *supra*.

Lone Wolf v. *Hitchcock*, 187 U. S. 565:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."

United States v. Kagama, 118 U. S. 375:

> "The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes."

The provision of the Constitution and the decisions above noted clearly show the plenary power of the Congress over the Indian of interest and his allotment and the instrumentality and agency employed by the Government in discharging its duty to said Indian. The Congress in Section 1, Act of June 16, 1906 (34 Stat. L. 267), reserved its powers with respect to Indians and property of Indians located in the State of Oklahoma, as follows:

> "That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

And by Section 22 of said Act required the acceptance of said Act as follows:

"That the Constitutional Convention provided for herein shall by ordinance, irrevocable, accept the terms and conditions of this Act."

Pursuant to these provisions, the Constitutional Convention in Article 25, Section 45, of the Schedule of the Constitution accepted said Act as follows:

"Be it ordained by the Constitutional Convention for the proposed State of Oklahoma; that said Constitutional Convention, do, by this ordinance irrevocable, accept the terms and conditions of an Act of the Congress of the United States, entitled, 'An act to enable the people of Oklahoma and the Indian Territory to form a Constitution and State Government and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original states,' approved June the sixteenth, *Anno Domini*, Nineteen Hundred and Six."

The appellant does not represent that the Congress has consented to the levy of such tax, but on the contrary represents that such consent is not necessary. The Congress having such plenary power, the state may not levy such tax on such instrumentality without the consent of the Congress. To hold that the state has such power independent of such consent, it will be necessary to blot out a century and a half of history and to ignore said Article I, Section 8, of the Constitution of the United States and to disregard or overrule many decisions of this Court. The freedom of such instrumentality from the tax here involved and from other taxes has been before this Court many times since the State of Oklahoma was admitted to the Union of States. This Court has uniformly held in such

cases the State of Oklahoma to be without the power to impose such tax until the Congress has consented to the levy thereof. Among the cases considered are the following: *Choctaw O. & G. R. Co.* v. *Harrison*, 235 U. S. 292; *Indian Ter. Ill. O. Co.* v. *Oklahoma*, 240 U. S. 522; *Howard, etc*, v. *Gypsy Oil Co.*, 247 U. S. 503; *Large Oil Co.* v. *Howard*, 248 U. S. 549; *Jaybird Mining Co.* v. *Joe Weir*, 271 U. S. 609; *Oklahoma, ex rel.*, v. *Barnsdall Ref., Inc.*, 296 U. S. 521.

In the case of *Choctaw O. & G. R. Co.* v. *Harrison, supra*, the Court said:

> "It is elementary that the Federal Government in all its activities is independent of state control. This rule is broadly applied. And without congressional consent no Federal agency or instrumentality can be taxed by state authority. 'With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579.' *Johnson* v. *Maryland*, 254 U. S. 51, 55, 65 L. ed. 126, 128, 41 Sup. Ct. Rep. 16. And see *Farmers' & M. Bank* v. *Minnesota*, 232 U. S. 516, 58 L. ed. 706, 34 Sup. Ct. Rep. 354; *Choctaw, O. & G. R. Co.* v. *Harrison, Supra*; *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505, 66 L. ed. 338, 340, 42 Sup. Ct. Rep. 171."

The question whether the taxes are non-discriminatory is immaterial, provided they burden the functioning of a Federal instrumentality. The question is, Has the state the power to levy any such tax, discriminatory or otherwise, without the consent of Congress? We submit that it has not because the sole power over commerce with Indians is vested by Article I, Section 8, of the Constitution, *supra*, in the Congress. Therefore, the power rests in the Congress whether exercised or not. The power of the Congress is not lost or vested in the state through non-exercise by the

Congress. If the Congress lost the power conferred upon it through non-exercise thereof, it would have lost before the exercise thereof much of its power that it now exercises and has exercised in the last fifty years.

The immunity from the taxes here involved is not an implied one. Article I, Section 8, of the Constitution, *supra*, sets Indians and their property apart from other citizens and their property, It vests the Congress with sole power over Indians and commerce with Indians. The state only has such power over Indians and commerce with Indians as it has acquired through the consent of the Congress. The Congress withheld from the State in Section 1 of the Enabling Act, *supra*, the power to tax Indians and the instrumentalities and agents employed by the Government in the discharge of its duty to the Indians.

The Congress is the sole arbitrator as to whether and when it will consent to the exercise by a state of the power to tax or otherwise regulate commerce with Indians. It has in many instances consented to the exercise by states of certain powers over such commerce. In Oklahoma it has consented to the partition of lands of deceased Indians, but, among others, it has withheld the power to provide the procedure for leasing for oil and gas mining purposes the restricted lands of restricted minor Indians and the right to confer the rights of majority upon minor Indians.

It has consented to the application to Osage mining leases of the tax law here involved known as the gross production tax statutes (Act of March 3, 1921, Sec. 5 of 41 Stat. L. 1249); consented to the application to Quapaw Indian mining leases of the tax law here involved known as the gross production tax statutes (Act of Mar[illegible] 3, 1921, Section 26 of 41 Stat. L. 225); consented to the application

to certain unallotted lands of Kaw Indians of the tax law here involved known as the gross production tax statutes (Act of April 28, 1924, 43 Stat. L. 111); consented to the application to allotted lands of Kaw Indians of the tax law here involved known as the gross production tax statutes (Act of May 27, 1924, 43 Stat. L. 176); consented to the application to mineral leases on unallotted land on Indian Reservations other than lands of the Five Civilized Tribes and the Osage Reservation of the tax statutes to the extent that they apply to unrestricted lands; and consented to the application to the Five Civilized Tribes of Indians of Oklahoma of the tax law here involved known as the gross production tax statutes in Section 3 of the Act of May 10, 1928, 45 Stat. L. 495, and in Section 3 of the Act of February 14, 1931, 46 Stat. L. 1108.

The Congress of the United States has never consented to the levy of this tax.

Under the admitted facts, the provision of the Constitution of the United States, *supra*, the provisions of the Enabling Act, *supra*, and the provisions of the Schedule to Oklahoma Constitution, *supra*, and the cases cited, the decision of the Supreme Court of Oklahoma is correct and should be affirmed.

Respectfully submitted,

R. O. Mason,
Hayes McCoy,
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Amici Curiae.